

DECISION



19014
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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Lunter*

FILE: B-199741

DATE: July 31, 1981

MATTER OF: Dynalectron Corporation

DIGEST:

1. Protester has burden of proving bias on part of agency's procurement officials and prejudicial motives will not be attributed to such officials on basis of inference or supposition.
2. Content and extent of agency's discussions with offeror is matter of judgment primarily for determination by agency involved and that determination is not subject to question by GAO unless it is clearly without reasonable basis. GAO finds agency's discussion approach was reasonable. Moreover, there is no requirement to discuss all inferior aspects of protester's otherwise technically acceptable proposal.
3. Questions or requests that offeror amplify upon or clarify particular aspects of its proposal have been regarded as sufficient to constitute meaningful discussions.
4. Record which merely indicates that agency and protester disagree as to value of discussions that occurred in some areas of offeror's proposal does not provide basis for GAO to conclude that meaningful discussions were not conducted with protester.
5. GAO finds that agency's evaluation board complied with requirement's of DOT Order 4200.11 regarding listing in written report to source selection official of evaluation criteria, weights given to each evaluation criterion, and scoring of proposals. In any event, GAO believes written report contains sufficiently detailed narrative analysis of each offeror's proposal to provide source selection official adequate factual basis for selection decision.

[Federal Railroad Administration Contract Award Protest]

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6. Record shows that, contrary to protester's assertion, some members of agency's board were present at protester's oral presentation. Protester has made no argument to support its contention that all members of board should have been present at oral presentation.
7. Determination of relative merits of offeror's technical proposal is primarily responsibility of procuring agency and GAO will not disturb agency evaluations unless arbitrary or in violation of procurement laws and regulations. Based on review of record, GAO believes that agency's evaluation of protester's proposal was reasonable.
8. Once discussions are reopened with one offeror after receipt of best and final offers, they must be reopened with all offerors in competitive range and opportunity given to submit revised proposals. However, GAO does not believe that agency's deduction of cost credit from awardee's cost proposal constituted reopening of negotiations because credit was mandated by RFP, awardee did not state exception to credit in proposal, application is mechanical, mathematical procedure and awardee was contacted for sole purpose of confirming application.
9. Once offerors are informed of criteria against which proposals will be evaluated, agency must adhere to those criteria or inform all offerors of any changes made in evaluation scheme. However, criterion which agency's board eliminated from consideration after receipt of initial proposals was not explicitly stated in RFP. Furthermore, even though criterion was not taken into account as separate factor, criterion was considered as part of criterion specified in RFP.

10. GAO does not believe elimination of evaluation subcriterion violated DOT Order 4200.11. GAO concludes that subcriterion was devised in accordance with terms of that order to assist board's technical evaluators in own internal deliberations.
11. GAO finds that fee was not major factor under RFP's source selection scheme. Agency's source selection plan which referenced fee as major factor was never communicated to any offeror during procurement and was superseded by RFP.
12. In cost-reimbursement procurements, evaluated rather than proposed costs provide sounder basis for determining most advantageous proposal. Conclusions reached by agency in evaluating proposed cost are entitled to great weight and GAO will not question agency's cost realism determination unless it is not supported by reasonable basis. Record shows that agency's cost evaluation of protester's and awardee's proposed costs was reasonable.

Dynalelectron Corporation (Dynalelectron) protests the award of a contract to Boeing Services International, Inc. (Boeing), under request for proposals (RFP) No. DOT-FR-936500 issued by the Department of Transportation (DOT), Federal Railroad Administration. The RFP was for the operation and maintenance of the Federal Railroad Administration Transportation Test Center, Pueblo, Colorado, for a period of 4 years with an optional fifth year.

Subsequent to the filing of this protest, Dynalelectron brought suit in the United States District Court for the District of Columbia against DOT and Boeing (Civil Action No. 80-2088). The court has stayed its decision pending our decision on Dynalelectron's protest.

Dynalelectron raises the following grounds of protest:

(1) Some of the members of the technical evaluation team were biased and prejudiced against Dynalectron and the bias and prejudice resulted in an unfair evaluation of Dynalectron's proposal;

(2) DOT failed to conduct meaningful discussions by not advising Dynalectron of the specific areas in which its proposals were allegedly deficient or weak and by not giving Dynalectron the opportunity to address and correct the alleged deficiencies or weaknesses;

(3) There was no rational basis for the differences in the point scores given under each technical evaluation criterion by DOT's evaluation board and the board's determinations of greater technical merit using point scores were not reasonably related to what the point scores meant in terms of an offeror's actual technical performance;

(4) Members of DOT's evaluation board were not present at Dynalectron's oral presentation and, consequently, the overall selection process under the RFP was prejudiced;

(5) DOT failed to demonstrate that its technical determinations had a rational basis because it did not provide anything in the procurement record other than ultimate conclusions without any factual support for the conclusions;

(6) DOT allowed Boeing the opportunity to revise its proposal after the submission of best and final offers, thereby constituting an improper reopening of negotiations prior to the execution of the awarded contract;

(7) DOT violated DOT Order 4200.11, section "E," paragraph 11(b), by deleting or changing certain technical evaluation criteria subsequent to the receipt of initial proposals;

(8) By ignoring the significant savings offered by Dynalectron's lower fee, DOT did not conduct the procurement in accordance with the

RFP's source selection plan which made fee a major price discriminator for purpose of selection; and

(9) DOT's cost realism analyses were defective and not performed in accordance with applicable regulations in that the cost realism plan was changed from the one DOT originally set up and DOT made cost adjustments which had no rational basis.

We find Dynalelectron's contentions without merit.

Background

The RFP was issued on August 13, 1979. The then incumbent contractor, Dynalelectron, had been providing the operation and maintenance services at the Transportation Test Center under a prior 4-year contract award in August 1976. Four proposals were received in response to the RFP, including one from Dynalelectron and one from Boeing. Following discussions with all the offerors, revised technical proposals were received on May 8, 1980, and final cost proposals were received on May 15, 1980. DOT's evaluation board, in its final technical evaluation, ranked Boeing's proposal superior to Dynalelectron's. On July 25, 1980, the agency's source selection official made the decision to award the contract to Boeing and, on the same date, Dynalelectron protested the decision to this Office. On July 29, 1980, the contracting officer awarded the contract to Boeing.

Bias in Board's Evaluation

Dynalelectron notes that, after the submission of best and final offers, the composition of DOT's technical evaluation board was changed. Two individuals were added. Dynalelectron alleges that one of the added individuals, if not both, was biased against it. Dynalelectron further alleges that one of the added individuals stated at one time to a Dynalelectron employee that he was going to do everything he could to help another company obtain the Transportation Test Center contract. According to Dynalelectron, the chairman of DOT's evaluation board was advised of the matter prior to the addition of the individual and the company was

informed that the individual would play no part in the source evaluation process. Thus, Dynalelectron believes the chairman's appointment of the individual as a technical evaluator in disregard of his assurances to Dynalelectron also shows that the chairman was biased against it.

Dynalelectron further contends that the record reveals a pattern of action on the part of the agency that consistently resulted in the company's competitive position being prejudicially compromised. In support of this contention, Dynalelectron alleges that DOT's board ignored certain documentation Dynalelectron submitted; attempted to evaluate certain aspects of Dynalelectron's technical proposal on a basis inconsistent with the RFP's evaluation factors; and failed to evaluate fee as a major price discriminator. In particular, Dynalelectron alleges that the scoring sheets of the technical evaluators furnished to it by DOT show scoring inconsistencies with regard to corporate test experience; management plan; understanding of interface requirements with various disciplines; ability to attract and retain highly qualified professional and technical personnel; qualifications of key personnel; and employee compensation and benefit package. According to Dynalelectron, an offeror with a lower point score in these areas was ranked higher than an offeror with a higher point score. As an example, Dynalelectron alleges that a point score of 7.13 rated "good" but a point score of 5.25 rated "very good."

DOT takes the position that the mere fact that some of the original five evaluation personnel changed during the procurement should not suggest any impropriety. DOT states that one technical evaluator was replaced prior to the receipt of best and final offers because of "serious illness." DOT also states that another technical evaluator was replaced after the receipt of final revised proposals--again because of "serious illness."

As to the prejudicial statement that Dynalelectron alleges one of the added evaluators made, DOT has submitted an affidavit from this individual in which he denies any prejudice in his technical evaluation of Dynalelectron or any other offeror. Further, DOT points out that Dynalelectron has cited no specific

instance of bias or prejudice in this individual's evaluation of Dynalelectron's proposal. Moreover, the agency indicates that it reviewed the final weighted scores of all the technical evaluators and conducted a separate analysis, removing each evaluator's scores from the overall scoring and ranking the offerors based on the remaining evaluators' scores. DOT states that, when the scores of the individual allegedly prejudiced against Dynalelectron were removed, the relative ranking of the offerors did not change, that is, Dynalelectron still ranked behind Boeing technically. DOT believes, then, that the uniformity of scoring by the evaluators dispels Dynalelectron's claim of bias.

Analysis

The critical test for determining bias in the agency's evaluation of proposals is whether all offerors in the competition were treated fairly and equally. See Servo Corporation of America, B-193240, May 29, 1979, 79-1 CPD 380. However, the protester has the burden of affirmatively proving its case and unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition. See A.R.F. Products, Inc., 56 Comp. Gen. 201, 208 (1976), 76-2 CPD 541.

We agree with DOT that Dynalelectron has cited no specific instance of bias or prejudice in the evaluation of Dynalelectron's technical proposal. Where the written record fails to demonstrate bias, the protester's allegations are properly to be regarded as mere speculation. See Sperry Rand Corporation, 56 Comp. Gen. 312, 319 (1977), 77-1 CPD 77.

With respect to Dynalelectron's allegations that DOT engaged in a pattern of action that consistently compromised Dynalelectron's competitive position, we believe that, at best, Dynalelectron is attempting to demonstrate agency bias on the basis of circumstantial evidence. We recognize that where the subjective motivation of an agency's procurement personnel is being challenged, it may be difficult for a protester to establish--on the written record which forms the basis for our Office's decisions in protests--the existence of bias. See Joseph Legat Architects, B-187160, December 13, 1977, 77-2 CPD 458. However,

we do not think that Dynalelectron's allegations regarding DOT's evaluation of proposed fee and the scoring sheets of the technical evaluators are sufficient in themselves to show a motivation or intent on the part of the agency's procurement officials to discriminate against the company.

Meaningful Discussions

Dynalelectron asserts that the "deficiencies" which DOT found in its proposals were never communicated to it until after the competition and following award of a contract to Boeing. Dynalelectron believes that, if these "deficiencies" had been properly pointed out during negotiations, Dynalelectron could have either convinced the agency of its erroneous assessments of Dynalelectron's proposals or changed its proposals to correct the alleged weaknesses. Specifically, Dynalelectron contends that, without the benefit of discussions, its technical proposal was determined to be deficient in the following areas: corporate test experience; interfaces and dialogue; planning and work control; retention and attraction of key personnel and compensation plan; subcontracting and Battelle laboratory experience; and quality assurance plans.

A. Corporate Test Experience

Dynalelectron alleges that in accordance with the RFP evaluation factors it extensively addressed the requirements for corporate test experience in its proposal. In particular, Dynalelectron alleges that its proposal outlined in detail corporate test experience on six major Government contracts. According to Dynalelectron, DOT rated Dynalelectron after the initial technical evaluation as having "significant corporate experience and a good management plan" applicable to Transportation Test Center-type operations. Without any indication from DOT of deficiencies regarding test experience, Dynalelectron alleges that it submitted its best and final proposal with only minor changes.

Upon final technical evaluation, Dynalelectron points out that DOT found that Dynalelectron's corporate test experience stemmed mainly from its involvement at the Transportation Test Center and that the company could not document at least four similar complex test

operation contracts like the one at the Transportation Test Center. Dynalelectron argues that it never had the opportunity through meaningful discussions to offer DOT a better proposal. If it had been advised of its deficiencies in this area, Dynalelectron asserts that it would have furnished additional information on the contracts discussed in detail in its proposal and could have provided additional information with more specific detail on the other contracts mentioned in both the Executive Summary and Section "I" portions of its proposal. In particular, Dynalelectron contends that it would have elaborated on its 31 years of continuous performance at the National Aeronautics and Space Administration (NASA) White Sands Missile Range.

DOT states that Dynalelectron's corporate test experience was, in fact, scored lower in the final technical evaluation. DOT further states that this was primarily because the technical evaluators in their initial evaluation erroneously considered prior railroad testing experience. According to DOT, railroad experience was removed from the evaluation process in the final evaluation because it was determined by the board that railroad experience was not set forth in the RFP's technical evaluation criteria. In any event, DOT acknowledges that Dynalelectron did, in fact, operate all of the contract facilities referenced in its proposals. In this regard, DOT emphasizes that Dynalelectron's score was only 0.3 below what was considered a "Major Positive Area" (strength) and, therefore, Dynalelectron's proposal in this area cannot be considered weak or deficient.

B. Interfaces and Dialogue

Dynalelectron alleges that DOT was again only able to identify deficiencies in this area after the submission of best and final offers. Dynalelectron points out that DOT's initial technical evaluation report rated Dynalelectron's proposal as having clearly recognized the interface requirements and as having an effective system to ensure a continuous dialogue. However, Dynalelectron notes that the final technical report evaluated Dynalelectron's proposals as having no indication of a continuous review or evaluation of programs and as giving only minimal attention to the interaction of various operation functions.

Dynalelectron asserts that the above-mentioned "deficiencies" directly relate to technical evaluation criteria set forth in the RFP for the attainment of the maximum technical score. Despite this relationship, Dynalelectron argues that the procurement record is barren of any direct or indirect statements that would indicate that Dynalelectron was not meeting the RFP's evaluation criteria in this area. Consequently, Dynalelectron alleges that it made only minor changes in its technical proposals for best and final offers. Furthermore, Dynalelectron takes the position that had DOT identified the "deficiencies" it found regarding interface and Government/contractor dialogue, Dynalelectron could have taken steps to clarify or revise its procedures to eliminate them.

DOT contends that Dynalelectron has ignored certain portions of the board's findings. DOT states that the board also found that the detail given by Dynalelectron to interfaces and daily contacts was good and considerable attention was given to objectives and milestones. DOT also calls our attention to the fact that Dynalelectron achieved an equal score to Boeing in this area. Thus, DOT believes that no deficiency existed in Dynalelectron's proposals with regard to interface and dialogue. Furthermore, DOT urges that it would have been inequitable and unfair to other offerors for it to have suggested ways for Dynalelectron, the incumbent contractor at the time, to improve its already more than acceptable proposal.

C. Planning and Work Control

Dynalelectron directs our attention to the fact that DOT's board scored the company 18 points lower in the final technical evaluation as a result of Dynalelectron's "continued inability to recognize test evaluation problems and propose sound solutions." Also, the board found that Dynalelectron's cost tracking system for the task/work order system would not meet the 7-day turnaround requirement for top performance. Given the fact that its initial technical evaluation was so much higher than its final score, Dynalelectron takes the position that it met all the RFP criteria for planning and work control. Again, Dynalelectron asserts that after best and final offers its proposals were severely downgraded without any opportunity being given to Dynalelectron to correct them.

DOT states that Dynalelectron's final score was a total 18 points lower for all factors, not just planning and work control. DOT indicates that the overall lower score was in part because for each technical evaluation factor point a score of 5, as opposed to 7 in the initial evaluation, was made "average." DOT also emphasizes that the lower scores on the final evaluation were consistently lower for all offerors, not just Dynalelectron. Finally, DOT contends that to have continually negotiated with Dynalelectron, suggesting specific ways for the company to improve its proposal in this area, would have been inequitable and unfair to the other offerors and would have ultimately resulted in technical leveling.

D. Key Personnel and Compensation Plan

Dynalelectron argues that DOT repeated the same pattern in evaluating Dynalelectron's key personnel and compensation plan as it did with the other areas of Dynalelectron's proposals. According to Dynalelectron, DOT's initial technical assessment was that its proposal showed above average ability with regard to personnel recruitment and retention through a realistic compensation plan. More specifically, Dynalelectron states that its initial proposal was found to have an "excellent" compensation plan to cover 36 of the company's top-salaried employees. Also, Dynalelectron's proposal was found to have exhibited a capability to attract critical, skilled people. However, in the final technical evaluation, Dynalelectron points out that DOT found that it had demonstrated a continued inability to attract and retain qualified professionals and that the plan to provide a bonus to 30 key personnel was proven to be of little value to retain experienced salaried personnel. Thus, Dynalelectron contends that, if DOT had informed it that specific aspects were deficient, Dynalelectron could have offered compensation plan improvements.

DOT states that at the time of the procurement there had been a 100-percent turnover in Dynalelectron's key personnel at the Transportation Test Center since the company had been awarded the operation contract in 1976. Furthermore, the individual listed as Dynalelectron's proposed Rail Dynamics Laboratory Manager in the company's initial proposal left the Transportation Test Center

prior to the submission of best and final offers. In addition, DOT states that the board knew that Dynalelectron's proposed Technical Service director had accepted another position within the company. Moreover, DOT notes that Dynalelectron's proposed Deputy Site Manager resigned from the company prior to DOT's announcement of the award to Boeing.

Turning to Dynalelectron's contention that its compensation package could have been improved if its weaknesses had been pointed out, DOT declares that it did ask Dynalelectron in writing for additional information on Dynalelectron's corporate incentive compensation plan and Dynalelectron was questioned in writing as to the plan's award fee relationship between proposed costs and probable costs. More importantly, DOT states that in Dynalelectron's oral presentation it was made clear that Dynalelectron was proposing compensation, incentive and bonus plans that were in part intended to address the problem of the high turnover of professional and trained technical personnel at the Transportation Test Center--a problem Dynalelectron acknowledged was of great concern to it as the then incumbent contractor. DOT further states that various aspects of compensation and personnel plans, as well as incentive and bonus plans, were discussed at the negotiation meeting and that changes were made in Dynalelectron's final plan for critical skill compensation.

Furthermore, DOT asserts that, as the incumbent contractor, Dynalelectron had an advantage over the other offerors on its intimate knowledge of Transportation Test Center operations. In this regard, DOT notes that Dynalelectron expressed a concern to it that discussions not be conducted with the others which might result in the technical leveling of proposals. Therefore, DOT believes that it is incongruous for Dynalelectron to contend that DOT did not adequately inform Dynalelectron of matters which Dynalelectron may not have wanted DOT to discuss with other offerors.

E. Subcontracting and Battelle
Columbus Laboratory

Dynalelectron argues that in the various correspondence between it and DOT during the evaluation process, in

the oral presentation, and in the oral negotiations, DOT did not point out deficiencies which it found in Dynalelectron's proposals regarding the company's subcontracting plan--in particular, the proposed use of Battelle Columbus Laboratory. In Dynalelectron's opinion, DOT did not raise any substantive issues regarding Dynalelectron's subcontracting plan in either the oral presentation or in the oral negotiations. Further, Dynalelectron argues that from the questions DOT raised in this area, neither Dynalelectron nor any other offer could have concluded that deficiencies were present. Rather, Dynalelectron believes that in its questions DOT dwelled on what can only be categorized as minute details.

In response, DOT declares that by a letter in November 1979, it requested from Dynalelectron an explanation of Battelle staffing in terms of quantity and location (whether onsite or offsite). In addition, DOT indicates that by letter of January 25, 1980, it requested clarification of Dynalelectron as to: (1) the role of Battelle's site manager, (2) who would evaluate subcontract performance, (3) how joint Battelle/Dynalelectron efforts would be monitored and managed, and (4) the number of years Battelle would be onsite. In the oral presentation, DOT states that it specifically addressed its lack of understanding of the Dynalelectron/Battelle contractual relationships, the level of effort Battelle would provide and the method of evaluating Battelle's performance.

DOT also states that during oral discussions it requested Dynalelectron to provide a more detailed proposal relative to the terms and conditions under which Battelle would perform. According to DOT, it was during oral discussions that Dynalelectron announced a new approach to its involvement with Battelle, that is, Battelle would be used only on an as-needed basis. In this regard, DOT calls our attention to Dynalelectron's April 15, 1980, letter confirming negotiations in which Dynalelectron stated that it would be revising its technical and cost proposals relative to Battelle and that the company's basic agreement with Battelle would be included in its final proposal. DOT states, moreover, that, although Dynalelectron in its post-negotiation documentation stated that a copy of the Battelle subcontract would be submitted with its final technical

proposal, no copy was provided by Dynalelectron with its final proposal.

In view of the foregoing, DOT takes the position that it did raise substantive issues regarding Battelle and that Dynalelectron was aware of the agency's concerns regarding the terms and conditions of the Battelle sub-contract. Consequently, DOT believes that Dynalelectron's allegations as to no substantive communications or discussions in this area are unfounded.

F. Quality Assurance Plan

Dynalelectron asserts that DOT's failure to conduct meaningful discussions is most visible with respect to the agency's consideration of the company's quality assurance plan. Dynalelectron alleges that DOT rated its plan as unacceptable because the plan missed certain key RFP requirements. Dynalelectron asserts that despite DOT's low evaluation of Dynalelectron's quality assurance plan, Dynalelectron never received one comment from DOT on it during the entire selection process.

DOT states that an offeror's quality assurance plan was of "minor significance" as an evaluation factor and was merged with the more significant factors of safety and security. Also, DOT states that Dynalelectron's quality assurance plan was determined to be unacceptable because Dynalelectron submitted a proposal which did not equal even the company's then current Transportation Test Center operations. In DOT's opinion, it was not appropriate for it to provide affirmative guidance to Dynalelectron by suggesting that Dynalelectron propose no less than what the company was then providing under its then existing operations contract.

Analysis

Before commenting on Dynalelectron's arguments why DOT failed to conduct meaningful discussions, we think it is appropriate to set forth several general principles concerning our review in this area.

Federal Procurement Regulations § 1-3.805-1 (1964 ed. amend. 153) requires that oral or written discussions be held with all offerors in a competitive

range, and we have recognized that this mandate can be satisfied only by discussions that are meaningful. Union Carbide Corporation, 55 Comp. Gen. 802, 806 (1976), 76-1 CPD 134. However, we have specifically rejected the notion that agencies are obligated under the above-cited statute to afford offerors all-encompassing negotiations. All-encompassing negotiations may unfairly prejudice the rights of other competing offerors. In particular, deficiencies or weaknesses in a proposal need not be pointed out when to do so could result in technical "transfusion" (disclosure of one offeror's innovative solution to a problem) or technical "leveling" (helping one offeror bring his original inadequate proposal up to the level of other adequate proposals by pointing out weaknesses resulting from lack of diligence or competence). 52 Comp. Gen. 870 (1973); 51 Comp. Gen. 621 (1972).

Further, the content and extent of meaningful discussions in a given case is a matter of judgment primarily for determination by the agency involved and that determination is not subject to question by our Office unless it is clearly without a reasonable basis. Washington School of Psychiatry, B-189702, March 7, 1978, 78-1 CPD 176; Systems Engineering Associates Corporation, B-187601, February 24, 1977, 77-1 CPD 137. Such matters are not subject to any fixed, inflexible rule. 53 Comp. Gen. 240, 247 (1973). Nevertheless, Government negotiators should be as specific as practical considerations will permit in advising offerors of the corrections required in their proposals. 52 Comp. Gen. 466, 468 (1973).

With these general principles in mind, we will now comment on the protester's arguments. Our comments are keyed to the above-lettered paragraphs.

A. RFP Technical Evaluation Criteria Factor IA required offerors to demonstrate corporate experience in performing testing, data collection and evaluation and how the offerors proposed to use the experience at the Transportation Test Center. In its final report, DOT's board concluded that outside the Transportation Test Center contract Dynalectron was weak in instrumentation and complex data analysis experience. We

believe it is clear that the board was not questioning whether Dynalelectron did in fact operate all of the contract facilities referenced in its proposal. Rather, it determined that Dynalelectron's involvement under those contracts consisted mainly of maintaining the facilities and equipment. The company itself performed few of these facilities' complex test operations.

Under the circumstances, we see no reason, then, for DOT to have engaged in extensive discussions with Dynalelectron in this area. DOT's board carefully examined the contracts set forth in Dynalelectron's proposal and found that Dynalelectron's experience was not similar to the Transportation Test Center in terms of performing testing operations. The record shows that DOT's technical evaluators contacted the Government contracting officers and contract monitors for these contracts and discussed the nature of Dynalelectron's performance on them. Furthermore, in view of the fact that Dynalelectron attained a high score for corporate experience, we agree with DOT that Dynalelectron's proposal cannot be deemed to have been deficient in this area. We believe that whatever inadequacies Dynalelectron had related mainly to inadequacies found in comparison with the superior score of Boeing. See Gould, Inc., B-192930, May 7, 1979, 79-1 CPD 311.

B. In addition to the statements referenced by Dynalelectron, DOT's board stated in its final report:

"Dynalelectron presents an understanding of the test complexities and interface functions as they exist at the Test Center. However, their understanding and problem recognition is based mainly on Test Center experiences where performance has been average. There is little evidence of solving interface problems on a continuing basis
* * *."

The record shows that although Dynalelectron's proposal contained some weaknesses, the company was found to have given good detail to interfaces and, overall, the company's understanding of the RFP's interface requirements was rated as acceptable. Therefore, we

cannot say that DOT was arbitrary or unreasonable in not discussing this aspect of Dynalelectron's proposal. We think that Dynalelectron is, in effect, contending that DOT should have discussed each area of its proposal receiving less than the maximum score. As we stated in Washington School of Pyschiatry, supra, there is no requirement to discuss all inferior aspects of an otherwise technically acceptable proposal.

C. RFP Factor IG required offerors to provide methods of furnishing work control and planning in all functional areas including task management, cost tracking and status reporting. Also, under RFP Factor IVC, offerors were required to submit information which clearly demonstrated experience and performance under contract to other Government and commercial organizations from the standpoint of detailed planning of projects, ability to meet schedules and control costs. In its final report, DOT's board stated:

"As the incumbent, Dynalelectron has a good understanding of the Task Order/Work Order system including the complex interfaces involved. As proposed, the cost tracking system will not meet the 7-day turn-around required for top performance. Steps, initiated by the RFP, are underway to transfer the system to on-site but are not noted in the proposal. Proven planning and scheduling performance is lacking."

Overall, the board rated Dynalelectron as acceptable with regard to work/cost control, planning, scheduling and reporting.

More importantly, it appears from the record that Dynalelectron erred in arguing that its planning and work control deficiencies were scored by DOT under RFP evaluation Factor II, Understanding of Operational Requirements and Problems. With regard to understanding operational requirements, moreover, Dynalelectron's proposal was scored second highest, higher than Boeing's. Consequently, while there may have been some weaknesses, we do not believe that Dynalelectron's proposal was deficient as to either planning and work control or understanding operational requirements.

We note that DOT did downgrade Dynalelectron's proposal under planning and work control because the company did not meet the 7-day cost-tracking report turnaround time. However, in its November 29, 1979, letter to Dynalelectron requesting clarification of ambiguities in Dynalelectron's proposal, DOT informed the company that on one page of its proposal it was stated that cost reports were to be issued every 2 weeks while other pages said weekly. We think that the request for clarification should have led Dynalelectron to any inadequacies regarding turnaround time for the issuance of cost-tracking reports. We have held that questions which lead offerors into areas of their proposals that are unclear are sufficient to put them on notice that their proposals may be inadequate in those areas. See, e.g., Systems Consultants, Inc., B-187745, August 29, 1977, 77-2 CPD 153; ASC Systems Corporation, B-186865, January 26, 1977, 77-1 CPD 60.

D. In our opinion, personnel issues and compensation plans were discussed extensively with Dynalelectron throughout the negotiation process. In addition, we believe it is clear that the discussions with Dynalelectron in this area were undertaken because of the high turnover rate of Dynalelectron's key operating personnel at the Transportation Test Center. As to Dynalelectron's compensation plan, DOT, in letters dated January 25, 1980, and March 11, 1980, questioned and requested additional information concerning various aspects of the company's proposed plan. Whatever weakness existed in Dynalelectron's proposals regarding its key personnel and compensation plans was the result of Dynalelectron's lack of diligence in preparing them. We have stated that the contracting agency need not point out weaknesses in a proposal which are the result of the protester's own lack of diligence, competence or inventiveness in preparing his proposal. 51 Comp. Gen. 621, supra; Raytheon Service Company; Informatics Information Systems Company, Inc., B-194928, March 25, 1980, 80-1 CPD 214.

E. We also believe that DOT's concerns with respect to Dynalelectron's Battelle subcontract were discussed extensively with Dynalelectron. In this regard, the record reveals the proposed Battelle subcontract was supposed to upgrade Dynalelectron's overall ability to perform complex testing because Battelle would be

providing special testing expertise from time to time. Throughout the procurement--in every letter that was sent to Dynalelectron seeking clarifications or raising questions--some mention was made by DOT of the proposed Battelle subcontract. We think, then, that the record establishes that DOT's discussion approach in this area was reasonable. At most, Dynalelectron has merely shown that it disagrees with DOT as to the value of the discussions that did transpire. Therefore, Dynalelectron's arguments fail to provide any basis for us to conclude that meaningful discussions were not held. See Portfolio Associates, Inc., B-192763, May 31, 1979, 79-1 CPD 384.

We also note that Dynalelectron alleges that it was downgraded in the general area of subcontracting without being afforded an opportunity to improve its proposal. DOT states that in the final evaluation report its board made no mention of this "minor item." Even assuming, then, that Dynalelectron is correct in contending that DOT should have discussed subcontracting, we fail to see how Dynalelectron has been prejudiced. The record shows that the actual difference in scores between Dynalelectron's initial proposal and its final proposal was primarily because railroad testing experience was removed as an evaluation criteria and because of Dynalelectron's failure to clearly define the nature and extent of its involvement with Battelle.

F. The record reveals that quality assurance was not an independent factor in DOT's technical evaluation of proposals. Rather, it was merged with safety and security factors. Dynalelectron's final score for the combined factors was second highest, higher than Boeing's. Under the circumstances, then, it is clear that Dynalelectron's proposal was not inadequate or deficient with regard to the combined evaluation factors. Consequently, we see no prejudice to Dynalelectron from DOT's not pointing out to the company that its quality assurance plan was unacceptable.

Basis for Variances in Point Scores

Dynalelectron contends that DOT has not provided an explanation as to how the ratings given to the offerors relate to their point scores. According to Dynalelectron, there is no rational basis for the variance in ranking

of the offerors under each evaluation criterion when such rankings are compared to the broad spectrum of scores given for each ranking. Dynalectron alleges that it found numerous inconsistencies in its review of the scoring sheets of DOT's technical evaluators. Dynalectron further alleges that it found discrepancies between the adjective ratings and the point scores in the chart of significant evaluation discriminators contained in the final report of DOT's board. As an example, Dynalectron alleges that a point score of 7.88 rated only "good" while an identical score rated "superior." Dynalectron also cites as examples other evaluation criteria areas where an offeror with a lower point score was ranked higher than an offeror with a higher point score.

In addition, Dynalectron asserts that DOT has failed to comply with the regulatory requirements of its Order 4200.11 (1972). Dynalectron emphasizes that under section "H," paragraph (3)(a)2, of the order, DOT's board must make final summary charts of what it considers to be significant discriminators among the proposals. Dynalectron further points out that, under paragraph (3)(b)2 of section "H," the board is required to trace evaluation criteria, weights and scoring in sufficient detail to permit examination of the results of each evaluation discriminator to the final results. Dynalectron goes on to argue that in the scheme set forth in Order 4200.11 for the detailed tracing of evaluation the significant technical discriminators are to be tied to point scores and, in turn, that the adjectival ratings used on the significant discriminators are to be based on a uniform application of scoring differences to each discriminator. Thus, Dynalectron asserts that the alleged lack of consistency evidenced in the technical evaluator's scoring sheets demonstrates DOT's noncompliance with Order 4200.11.

In response, DOT states that each step of the procurement process from the solicitation of proposals to the award of the contract was recorded. DOT believes that the documentation is both extensive and voluminous. Also, DOT notes that the procurement record includes the initial and final scoring sheets of all proposals. Therefore, DOT takes the position that there was compliance with Order 4200.11 and that a detailed "audit

trail" was made tracing the point scoring to the technical evaluation criteria.

DOT also states that, pursuant to Order 4200.11, its board directed the preparation of a significant Discriminator Chart as a subject overlay to the written report of its technical evaluators in order to highlight areas of technical evaluation that were close, that a significant Discriminator Chart was derived from the written report of the technical evaluators and that the chart was merely used as a supplement to the primary evaluation tool of the actual scores of the technical evaluators.

Analysis

The provisions of DOT Order 4200.11 which Dynalectron has referenced in support of its arguments deal with the preparation of the written report of the board's evaluation findings to the source selection official. It appears that the order is a document spelling out internal operating procedures rather than a procurement regulation having a binding effect between the agency and the offerors. However, in any event, we do not find that there was any violation of the order. Subparagraph 3c(3)(a)(2) of section "H" provides that the board's findings shall include, as background, final summary charts of what the board considers to be the significant discriminators among proposals. Subparagraph 3c(3)(b)(2) provides that the board report shall include, as appropriate, the evaluation criteria, the weights given to each evaluation and the scoring of the proposals. This is to allow the Source Selection Official to examine in detail each phase of the evaluation and to trace the discriminators to the final results. In short, we believe that these portions of DOT Order 4200.11 are designed to give the source selection official sufficient information to make the selection decision.

From our review of the contents of the board's final report, we believe that it complied with the above-mentioned requirements of DOT Order 4200.11 for report content. As to the alleged discrepancies between the point scores and the adjective ratings on the significant Discriminator Chart, it appears from the record that the adjective ratings on the

chart were presented in the context of each offeror's total evaluation score. Also, we note that DOT indicates that the adjective ratings on the chart maintained a relativity to the underlying scores of the technical evaluators and that the significant Discriminator Chart did not change or add to the scores of the technical evaluators. In any event, we think that the board's final report contains a narrative discussion of the strengths and weaknesses of each offeror's proposal sufficiently detailed to provide the Source Selection Official with an adequate factual basis for the selection decision.

With regard to the inconsistencies that Dynalelectron alleges exist in the actual scoring sheets of the technical evaluators, we find that the company has offered no specific examples of such inconsistencies. Rather, it appears that in referring to areas where an offeror with a lower point score was ranked higher than an offeror with a higher point score, Dynalelectron is making arguments pertaining to alleged inconsistencies in the Significant Discriminator Chart contained in the board's final report.

Presence of DOT Board Members at Oral Presentation

Dynalelectron has presented no argument in support of its contention that the overall selection process was prejudiced because members of DOT's board were not present at Dynalelectron's oral presentation. In any event, the record shows that four members of DOT's board were present at Dynalelectron's oral presentation. As to those members who did not attend, we have held that all of a board's technical evaluators need not rescore the revised proposals submitted by the offerors. See Columbia Research Corporation, B-193154, May 15, 1979, 79-1 CPD 353. We see no reason to apply a different rule with regard to the attendance of the members of an agency's evaluation board at an offeror's oral presentation.

Rational Basis for Technical Determinations

Before setting forth Dynalelectron's arguments in support of its contention that there was no rational basis for DOT's technical determinations, we believe it is necessary to state the general principles which govern our review of an agency's technical evaluations.

The determination of the relative merits of a proposal, particularly with respect to technical considerations, is primarily a matter of administrative discretion. Dynamic Science, Inc., B-188472, July 20, 1977, 77-2 CPD 39. Our function is not to evaluate anew proposals submitted and make our own determinations as to their relative merits. Houston Films, Inc. (Reconsideration), B-184402, June 16, 1976, 76-1 CPD 380. That function is the responsibility of the contracting agency which must bear the burden of any difficulties resulting from a defective evaluation. Macmillan Oil Company, B-189725, January 17, 1978, 78-1 CPD 37. In light of this, we have repeatedly held that procuring officials enjoy a reasonable degree of discretion in evaluation of proposals and that this will not be disturbed unless shown to be arbitrary or in violation of the procurement laws and regulations. Piasecki Aircraft Corporation, B-190178, July 6, 1978, 78-2 CPD 10.

Additionally, the protester has the burden of affirmatively proving its case. C. L. Systems, Inc., B-197123, June 30, 1980, 80-1 CPD 448. The fact that the protester does not agree with the agency's evaluation of its proposal does not in itself render the evaluation unreasonable. Kaman Sciences Corporation, B-190143, February 10, 1978, 78-1 CPD 117.

With these general principles in mind, we will now examine Dynalelectron's arguments.

A. Corporate Test Experience

Dynalelectron contends that there is no evidence in the record to support DOT's finding that Dynalelectron's corporate test experience stemmed primarily from its involvement at the Transportation Test Center and that Dynalelectron could not document at least four similar complex test operations like the Transportation Test Center. In Dynalelectron's opinion, DOT ignored the substantial corporate test experience in all the contracts outlined in its proposal, including 31 years of continuous performance by Dynalelectron at the NASA White Sands Missile Range. Also, Dynalelectron asserts that DOT's reassessment of the company's corporate test experience centered on the NASA White Sands Test Facility (WSTF) contract held by Dynalelectron from

1972 to 1975. According to Dynalelectron, this contract provided a substantial basis for its corporate experience qualifications for award of the Transportation Test Center contract in 1976; yet, this test experience was deemed inadequate in 1980, even though it had been substantially increased by 4 years as incumbent contractor at the Transportation Test Center.

More specifically, Dynalelectron challenges the following statement made in the report DOT prepared on this protest:

"According to the Contracting Officer at WSTF, the Technical complexity of work increased significantly and therefore they determined Dynalelectron did not have the corporate testing experience they required and as a result a contract was awarded to the Lockheed Corporation, who was preceived to be technically stronger, at a higher price."

Dynalelectron has submitted a letter dated January 5, 1980, from the contracting officer at WSTF stating that he did not remember talking to anyone from DOT concerning Dynalelectron's performance at WSTF and that he would not have agreed with the above-quoted statement then or now.

In response, DOT reiterates the fact that the technical evaluators did discuss with the applicable contracting officers and contract monitors the contract facilities that Dynalelectron stated in its proposal it operated. DOT states that the significant reduction in Dynalelectron's technical score in this area from the initial evaluation is in large part attributable to the investigation of Dynalelectron's previous contracts to establish corporate test experience in operations similar to the Transportation Test Center. DOT emphasizes that the technical evaluators' ultimate conclusion based on this investigation was that Dynalelectron's involvement on these previous contracts consisted mainly of maintaining the facilities and equipment and Dynalelectron performed few of the complex test operations at these facilities itself.

In addition, DOT notes that Dynalelectron's experience at WSTF from 1972 through 1975 did provide a substantial basis for award of the Transportation Test Center contract to it in 1976. DOT points out, however, that the technical requirements of the work at the Transportation Test Center have increased greatly since the 1976 competition from a role of supporting a test to the role of actual conducting a test, collecting the data and evaluating the results. Thus, DOT asserts that Dynalelectron's previous WSTF experience was not in consonance with the Transportation Test Center operating requirements set forth in the RFP.

B. Key Personnel

Dynalelectron challenges the board's finding that during the period between the initial and final technical evaluation, Dynalelectron lost several key technical people. Dynalelectron alleges that the key technical people referred to by the board were identified in the postaward debriefing. Dynalelectron goes on to argue that, under the technical evaluation criteria set forth in the RFP, the ability to retain personnel applied only to key technical engineers and management, that is, salaried employees. According to Dynalelectron, none of the individuals identified at the postaward debriefing were salaried employees. Consequently, Dynalelectron believes that the downgrading by the board in this area cannot be justified.

Dynalelectron also questions the overall determination that the company's actions demonstrated a continued inability to attract and retain qualified professionals. In this regard, Dynalelectron asserts that the board completely ignored the fact that, based on local and State turnover rates, it was well below the average for Pueblo and for Colorado on the whole. Dynalelectron further asserts that the loss of three people in comparison with its staff of 168 at the Transportation Center cannot be said to constitute a significant turnover of personnel. Finally, Dynalelectron argues that DOT is in error with regard to the reasons for the transfer of some of its key people because the company made plans for them elsewhere in the organization in the event the contract was not awarded to it.

DOT contends that Dynalelectron has attempted to use a narrow interpretation of the RFP to establish that the board could not justify downgrading Dynalelectron's failure to retain nonsalaried personnel. DOT states that the RFP required offerors to submit a recruitment plan for "acquiring" skilled professionals and technicians, including plans to utilize onsite personnel as appropriate. While the requirement may have technically only specified personnel acquisition, DOT believes that it is illogical to assume that the purpose of a company's recruitment of personnel is other than to have them continue in the company's employ.

With regard to the turnover of Dynalelectron's personnel, DOT calls our attention to the fact that since the 1976 contract competition for the Transportation Test Center there has been a 100-percent turnover in Dynalelectron's key personnel.

C. Planning and Work Control

Dynalelectron contends that DOT's evaluation of its proposed 7-day turnaround period for cost tracking reports was irrational. Dynalelectron asserts that no time requirement is mentioned in the RFP for cost reports even though it appears from the evaluation that DOT was implying there was one. Dynalelectron further asserts that, even though it specifically stated that it would meet the 7-day turnaround time, DOT still downgraded its proposal in this area.

Dynalelectron also disagrees with DOT's conclusion that Dynalelectron should have updated its final proposal to set forth the exact plan for transferring Dynalelectron's cost tracking system from the company's corporate office to the Transportation Test Center. Dynalelectron contends that at the time for submission of final proposals no need existed for Dynalelectron to update its proposal. More specifically, Dynalelectron contends that the actual implementation of the transfer plan was contingent on a computer becoming operationally ready at the Transportation Test Center. According to Dynalelectron, the Transportation Test Center computer was not operationally ready at the time of best and finals.

DOT states that in its final proposal Dynalelectron did not state that a 7-day turnaround would be met for cost tracking reports. Dynalelectron merely stated that reports would be issued weekly. As to Dynalelectron's plan for transferring its cost tracking system to the Transportation Test Center, DOT states Dynalelectron only indicated in its final proposal that "as soon as possible" in the new contract it would move its cost tracking system and that analysis of the needed program changes would begin "as soon as" DOT awarded the Transportation Test Center computer contract. DOT further states that the computer contract had been awarded 4 months before the time for submission of final proposals.

D. Battelle Subcontract

Dynalelectron argues that DOT has ample assurance that Battelle was a "committed team member" of Dynalelectron. In this regard, Dynalelectron alleges that DOT's board had a written letter of intent from Battelle furnished by Dynalelectron's proposal. Dynalelectron also asserts that the board had detailed oral assurances of two Battelle officials given at the company's oral presentation and a copy of a written binding agreement that Dynalelectron had with Battelle to use that company in a technical support role in the event the Transportation Test Center contract was awarded to Dynalelectron. More specifically, Dynalelectron charges that the board knew that Dynalelectron had entered into a written, formal, binding agreement with Battelle committing itself to pay a minimum fee of \$40,000 per year even if no work was called for and to negotiate a definitized subcontract if Dynalelectron was awarded the Transportation Test Center contract. According to Dynalelectron, a copy of the Battelle agreement was submitted with Dynalelectron's final cost proposal rather than its final technical proposal.

DOT states that between initial and final proposal evaluation, Dynalelectron instituted a major redirection of its use of Battelle. DOT states that in its final proposal Dynalelectron eliminated all onsite Battelle staff and associated costs and in its place proposed an oncall arrangement. As to the definitized agreement between Dynalelectron and Battelle, DOT indicates that during negotiations it neither requested nor required

a definitized subcontract, but it did ask for a definitive proposal setting forth Battelle's testing involvement. According to DOT, however, the agreement Dynalectron ultimately submitted was dated October 5, 1979, predating Dynalectron's initial proposal submission by 1 month. Thus, DOT argues that this agreement did not reflect any changes relative to Dynalectron's major redirection of the proposed use of Battelle. DOT emphasizes, moreover, that the agreement submitted was not specific in any technical area.

In addition, DOT states that the Battelle agreement provided no specific contract cost information and, therefore, could only be considered as part of Dynalectron's technical proposal. As supplemental information to Dynalectron's technical proposal, DOT states, however, that the agreement was late since it was submitted after the date technical proposals were due. The late agreement, then, was not provided to the board.

Analysis

(keyed to above-lettered paragraphs)

A. We fail to understand Dynalectron's allegation that DOT ignored the corporate test experience in the contracts outlined in its proposal since DOT explicitly states that the technical evaluators conducted an investigation of Dynalectron's previous contracts to establish corporate test experience in operations similar to the Transportation Test Center. Dynalectron has provided no argument concerning the nature and extent of its test experience as contractor for 31 years at the NASA White Sands Missile Range. As to Dynalectron's experience from 1972 to 1975 at WSTF, we think that DOT has sufficiently established that Dynalectron's test experience at WSTF was limited and not in consonance with the RFP's test requirements.

With regard to Dynalectron's attempt to discredit DOT's investigation of Dynalectron's test experience, we note that DOT insists that one of its technical evaluators did in fact have a telephone conversation in June or July 1980 with the contracting officer at WSTF and that the technical evaluator discussed the performance of both Dynalectron and Lockheed Corporation at

WSTF with particular emphasis placed on the relative magnitude and complexity of WSTF activities during the respective tenure of the two companies. In this regard, DOT has submitted an affidavit from the technical evaluator setting forth the details of the above-mentioned discussion. Moreover, DOT has attached to the evaluator's affidavit several documents given to it by NASA. These NASA documents further verify, in our opinion, the factual content of the statements made in the affidavit of the technical evaluator.

B. We believe that Dynalelectron has offered little evidence to show that DOT's board incorrectly concluded that Dynalelectron had experienced a very high turnover in both professionals and technicians during the period of time that it was operating contractor at the Transportation Test Center. The several key technical people that Dynalelectron lost during the period between technical evaluations were merely cited by DOT's board as a further demonstration of Dynalelectron's continued inability to attract and retain qualified professionals. More importantly, Dynalelectron had received a high initial scoring for its Personnel Plan because of its bonus and incentive plans for its upper management staff and other selected individuals. The record reveals that upon closer evaluation, Dynalelectron's bonus plan was found to be of "little value to retain experienced salaried personnel." The board ultimately found that there were few fringe benefit incentives and only the basics in retirement benefits.

C. In its final report, DOT's board stated that Dynalelectron's cost tracking system, "as proposed," would not meet the 7-day turnaround required for "top performance." From our reading of the report, we do not think that the board was implying that Dynalelectron failed to meet any RFP requirements for the submission of cost tracking reports. Rather, we think the board was indicating that the time required to complete the cost tracking cycle from Dynalelectron's proposed computerized cost tracking system to the Work Control Center and back into the cost tracking system would be more than 7 days. Further, we note that Dynalelectron's proposal stated only that its Work Control Center would use weekly reports from the cost tracking system to track work order performance.

With respect to the transfer of Dynalelectron's cost tracking system to the Transportation Test Center, we fail to understand why the fact that the center's computer was not operationally ready should have prevented Dynalelectron from submitting in its final proposal an overall plan for implementing transfer. While Dynalelectron may not have been able to submit a precise schedule of required programming changes, we believe that the company could have noted the general steps to be taken to accomplish the transfer. In its final report, DOT's board noted that some steps were underway to transfer Dynalelectron's cost tracking system onsite but such steps were not set out in Dynalelectron's proposal.

D. The record shows that in addition to the findings DOT made from the investigation of Dynalelectron's test experience, Dynalelectron's proposal was downgraded because DOT reevaluated the role of Battelle in providing in-depth technical capability. We agree with DOT that during negotiations its board was essentially asking for a definitive proposal setting forth Battelle's testing involvement. However, it is clear from the record that Dynalelectron's involvement with Battelle was not clearly defined with Battelle having no personnel at the Transportation Test Center or any formal subcontract to perform a specified number of tasks or functions. Under the circumstances, we believe that DOT's findings in this area had a rational basis in fact.

Revision of the Boeing Proposal

Dynalelectron contends that Boeing was allowed an opportunity to revise its cost proposal after the submission of final proposals. In Dynalelectron's opinion, DOT's adjustment in Boeing's contract price constituted a reopening of negotiations because any change in a proposal once it is submitted after best and finals constitutes negotiations. Therefore, Dynalelectron argues that negotiations should have been reopened with all offerors and new best and finals requested. According to Dynalelectron, if an offeror is given the opportunity to discuss portions of its proposal, whether or not such discussions ultimately take place, the agency must open discussions with all offerors within the competitive range.

DOT states that it specifically examined all cost elements set forth in Boeing's proposal and determined with regard to direct labor and fringe benefits that \$1,150,149 in cafeteria credits were not taken against labor. Amendment 3 provided that offerors were to include in their cost proposals as a credit for cafeteria and motor pool against direct labor cost \$200,000 for the first contract year escalated by 7 percent for each follow-on year of the contract. Having made the determination that Boeing's proposal did not contain a cafeteria credit, DOT states that it decided that it would be appropriate to obtain clarification from Boeing. Boeing was contacted by telephone and asked where in its cost proposal it had taken the cafeteria credit and, in a subsequent telephone response, Boeing confirmed DOT's determination that a cafeteria credit had not been taken. DOT declares that it reduced the estimated cost of Boeing's proposal based upon the Government's adjustment for cafeteria credits mandated by amendment 3 to the RFP.

In response to Dynalelectron's contention that discussions took place, DOT points out that Boeing made no change in its proposal and did not submit any contract document. DOT further argues that, because the cafeteria credit adjustment was clearly mandated by the Government in the RFP, it was only reasonable to reflect this credit to the Government in the estimated cost of the awarded contract. DOT further points out, moreover, that the reduction in the estimated contract cost was taken after Boeing was selected for award. Thus, DOT believes that since the reduction in no way affected the award decision, no negotiations occurred after the receipt of best and finals.

Analysis

In negotiated procurements, meaningful discussions must generally be held with all offerors whose initial proposals are acceptable. See John Fluke Manufacturing Company, Inc., B-195091, November 20, 1979, 79-2 CPD 367. If discussions are reopened with one offeror after the receipt of best and final offers, they must be reopened with all offerors in the competitive range and an opportunity given to submit revised proposals. University of New Orleans, B-184194, September 19, 1977, 77-2 CPD 201. However, whether discussions have

been held is a matter to be determined on the basis of the actions of the parties involved. New Hampshire-Vermont Health Service, 57 Comp. Gen. 347 (1978), 78-1 CPD 202. While it is not always easy to determine if a Government-offeror contact or interchange constitutes competitive range discussions, we have stated that the acid test of whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise or modify its proposal. See 51 Comp. Gen. 479 (1972); The Human Resources Company, B-187153, November 30, 1976, 76-2 CPD 459.

From the record, it is clear that the cafeteria credit was mandated by the terms of amendment 3 to the RFP and was not offered as a means to induce any negotiated concession from Boeing. Boeing did not state any exception to the credit in its proposal and the application of the credit is a mechanical, mathematical procedure. Since the post-closing-date contact with Boeing was for the sole purpose of confirming the mechanical application of the credit specified in the RFP and since no new information resulted from the interchange between the parties, the contact did not constitute improper discussions. General Kinetics, Inc., B-190359, March 24, 1978, 78-1 CPD 231.

Change in Technical Evaluation Criteria

Dynalelectron asserts that DOT violated the requirements of DOT Order 4200.11 by changing the RFP technical evaluation criteria after the submission of initial proposals. In this regard, Dynalelectron charges that, by deleting railroad experience as an evaluation criterion under RFP Factor IIA, DOT blatantly ignored the requirement of paragraph 11(b)1 of section "E" of the Order that evaluation criteria and weights shall not be changed after proposals are submitted. In Dynalelectron's opinion, the RFP evaluation criteria, when taken together with the RFP's statement of work, identified railroad experience as a criterion. As an example, Dynalelectron cites RFP section "D," page D-2, Factor IA, which required demonstrated experience in performing testing, and RFP paragraph 1.4.1 in the statement of work, which described the requirements for testing of track, vehicles, systems and components. Dynalelectron asserts that it was clearly prejudiced by the elimination of the railroad experience criterion

as evidenced by the consequent downgrading of its proposal and the upgrading of Boeing's proposal.

DOT states that in the initial evaluation of proposals, the technical evaluators "erroneously" considered prior railroad testing experience as a separate subfactor under RFP evaluation Factor I. According to DOT, railroad experience was removed from the evaluation process in the final evaluation because the board determined that railroad experience was not set forth in the RFP technical evaluation criteria. Therefore, in order to conform to the evaluation criteria, DOT indicates that the technical evaluators were directed to remove this evaluation consideration from the final scoring.

Analysis

While procuring agencies have broad discretion in determining the evaluation plan they will use, they do not have the discretion to announce in the solicitation that one plan will be used and then follow another in the actual evaluation. See Umpqua Research Company, B-199014, April 3, 1981, 81-1 CPD 254. Once offerors are informed of the criteria against which their proposals will be evaluated, the agency must adhere to those criteria or inform all offerors of any significant changes made in the evaluation scheme. Telecommunications Management Corporation, 57 Comp. Gen. 251 (1978), 78-1 CPD 80; Eastman Kodak Company, B-194584, August 9, 1979, 79-2 CPD 105. Consequently, it is improper for an agency to depart in any material way from the evaluation plan described in the solicitation without informing the offerors and giving them an opportunity to structure their proposals with the new evaluation scheme in mind. Umpqua Research Company, supra.

On the other hand, while agencies are required to identify the major evaluation factors applicable to a procurement, they need not explicitly identify the various aspects of each which might be taken into account. All that is required is that those aspects not identified be logically and reasonably related to or encompassed by the stated evaluation factors. Buffalo Organization for Social and Technological Innovation, Inc., B-196279, February 7, 1980, 80-1 CPD 107. Here,

it is clear that railroad test experience was not an explicitly stated evaluation factor. The RFP listed as a subelement under evaluation Factor I, Corporate Test Experience and Management Plan, demonstrated corporate experience in performing testing, data collection and evaluation and how the offeror proposed to use such experience at the Transportation Test Center.

Furthermore, even though railroad experience was not taken into account as a separate factor in the final evaluation, DOT investigated the previous contracts the offerors listed in their proposals to establish corporate test experience. The results of that investigation were taken into consideration in evaluating the proposals. Thus, to the extent the contracts listed by the offerors concerned railroad testing, the corporate experience in performing railroad testing was taken into consideration.

Therefore, we do not find that DOT deviated from the corporate test experience factor specified in the RFP.

With regard to Dynalelectron's contention that DOT violated the requirement of paragraph 11b of section "E" of DOT Order 4200.11, we believe that Dynalelectron has ignored the plain meaning of the paragraph. Paragraph 11b only prohibits changes in the stated RFP evaluation criteria once proposals are received. From our view of the record, it appears that the subfactor criteria for railroad experience employed by the technical evaluators in the initial technical evaluation was devised pursuant to section "E," paragraph 11a, of DOT Order 4200.11. Paragraph 11a provides:

"Determining Team Efforts. Prior to receipt of proposals, the SEB shall determine which evaluation criteria will be assigned to teams for evaluation and make the team assignments. Teams shall develop their own subcriteria and internal values or weights, as appropriate, and submit them to the SEB for approval. The scoring system used by teams shall be developed independently of the values or weights established for SEB use. Criteria weights determined by the SEB

shall not be disclosed to any team member who is not also an SEB member."

We believe, then, that the subcriteria for railroad experience was devised in order to assist the technical evaluators in their internal deliberations and that the board's elimination of this subfactor criterion after receipt of proposals was not prohibited by DOT Order 4200.11.

Fee as a Major Price Discriminator

Dynalelectron alleges that DOT throughout the selection process totally ignored the significant savings offered by its having the lowest fee of any of the four offerors. Dynalelectron further alleges that the board never brought the issue of fee to the attention of the Source Selection Official. According to Dynalelectron, DOT's Source Selection Plan made fee a major price discriminator for purposes of selecting the contract awardee. Therefore, with a savings in fee of such an allegedly large magnitude and with the importance of fee as a major discriminator, Dynalelectron argues that the Source Selection Official's selection of the most advantageous proposal might have been other than Boeing's if the matter of fee had been brought to his attention.

In response, DOT takes the position that the Source Selection Plan, prepared in May 1979, was solely a communication between the Transportation Test Center and the Secretary of Transportation to establish the general ground rules for the forthcoming procurement and was never intended to be a document that set forth the criteria for evaluating proposals. More specifically, DOT states that the Source Selection Plan was never sent to offerors nor was any representation ever made to the offerors that the plan would be used to evaluate proposals.

DOT further argues that the Source Selection Plan was superseded by the RFP which set forth the actual requirements and criteria for offerors to propose against. DOT emphasizes that the RFP established proposal evaluation criteria and the relative importance of the major evaluation factors. Specifically, DOT points out that paragraph 21 of the RFP provided that

cost would be a significant factor in the award decision but cost would be a "less significant factor" than the technical proposal. According to DOT, there is no requirement under the Federal Procurement Regulations that cost-reimbursement-type contracts be awarded on the basis of either (1) the lowest proposed cost, (2) the lowest proposed fee, or (3) the lowest estimated cost plus proposed fee. Rather, the primary consideration in determining to whom the award under a negotiated procurement shall be made is which contractor can perform the contract in a manner most advantageous to the Government.

Analysis

Based on our review of the record, we find that fee was considered by the board and also that the matter was brought to the attention of the Source Selection Official. The report of the cost evaluators to the chairman of the board contains several sections where the fees of the offerors are set out for comparison. The board's final report to the Source Selection Official contains several such sections as well. Further, we find Dynalelectron's argument that DOT was required to award the Transportation Test Center contract to Dynalelectron in light of the company's low fee contradicts the selection scheme contained in paragraph 21 of the RFP. Under this paragraph, the contract was essentially to be awarded to the offeror whose proposal offered the technical/cost relationship most advantageous to the Government.

Evaluation of Cost Proposals

Dynalelectron asserts that the cost evaluation performed by DOT lacked a rational basis. Dynalelectron also contends that the various adjustments and lack of adjustments made to the various offerors' proposed costs did not comply with the requirements of the Federal Procurement Regulations--in particular, in the areas of vacation, salaried paid time off, cafeteria credits and relocation. With regard to relocation costs, Dynalelectron alleges that DOT ignored the failure of Boeing to offer the minimum number of salaried man-years of effort as required by amendment 3 to the RFP.

A. Vacation

Dynalelectron questions DOT's decrease of its proposed productive man-hours by 21 hours per employee because the Dynalelectron cost proposal deducted only 59 hours per year for vacation instead of 80 hours. According to Dynalelectron, this adjustment resulted in an increase in Dynalelectron's proposed cost of over \$348,556. Dynalelectron argues that by the above-mentioned action, DOT ignored the regulatory requirement that agencies consider historical costs. According to Dynalelectron, the historical experience set forth in its cost proposal clearly showed that only 59 hours per year were necessary for vacation.

DOT states that there was more, to the area of vacation than Dynalelectron's past experience. According to DOT, there was the more significant matter of fairness to all offerors in the evaluation. DOT argues that only Dynalelectron, the then incumbent contractor, had the benefit of knowing the historical experience at the Transportation Test Center as to vacation used. In order to avoid any unfair advantage in favor of Dynalelectron, DOT provided employee longevity data to all offerors for their use in computing longevity. DOT states that this data showed that by the contract award date all employees would be required to be given 80 hours of vacation. Consequently, having provided employee longevity data to all offerors and having seen that no offeror other than Dynalelectron deducted less than an average of 80 hours per year for vacation, DOT states that it was its judgment that to permit Dynalelectron to use a 59-hour vacation factor would not have been reasonable, fair, or rational.

B. Salaried Paid Time Off

Dynalelectron asserts that DOT again erroneously decreased its proposed productive man-hours per person. In Dynalelectron's view, DOT simply did not assess the merits of Dynalelectron's cost proposal in terms of hours salaried paid time off per salaried employee. In arriving at productive man-hours per person, Dynalelectron alleges that it computed salaried paid time off at a rate of 19 hours per salaried employee. Dynalelectron further alleges that in its cost proposal it gave an extensive explanation for the reduction from 38 hours

in the past to the 19 hours that it proposed. According to Dynalelectron, the reduction to 19 hours was based upon development of formal written procedures for control of time off and more accurate accounting of extra hours beyond 40 hours worked by salaried persons. Dynalelectron contends that, despite this extensive explanation, DOT added 19 hours per salaried employee for salaried time off.

DOT states that Dynalelectron submitted historical data to it that showed that the company averaged 38 hours per year of paid time off for salaried employees. DOT admits that Dynalelectron did publish just prior to its final proposal submission a General Management Instruction which attempted to change Dynalelectron's policy on salaried personnel compensatory time. DOT states, however, that the General Management Instruction was considered to be unclear and inconsistent. DOT further states that the instruction possibly permitted unallowable costs to be claimed under the contract as it allowed personnel in some instances to take compensatory time off with pay prior to their accruing such time. In DOT's opinion, this was believed not to meet the definitions contained in the Federal Procurement Regulations for allowability and allocability. In any event, DOT asserts that it did consider and assess the merits of Dynalelectron's proposed savings based on the company's General Management Instruction and concluded that a proper result was to project costs in this area using 38 hours instead of 19.

C. Cafeteria Credits

As an alternative to its argument that DOT reopened negotiations by giving Boeing over \$1 million dollars in cafeteria credits after best and final offers, Dynalelectron contends that there is no supporting evidence in the record to indicate that a thorough analysis of Boeing's proposal was done to eliminate the possibility that Boeing had in fact already taken the credit. In this regard, Boeing argues that the cafeteria credit adjustment could have been made in any number of ways other than a specific line item deduction. As an example, Dynalelectron indicates that a credit in direct labor could have been taken. Dynalelectron urges that we undertake an in-depth analysis

of Boeing's cost proposal to insure that a double credit was not given to Boeing.

DOT insists that the board's cost evaluation team checked and rechecked the possibility of Boeing having taken the credit for cafeteria receipts. DOT states that only when the board assured itself that the credit was not taken by Boeing anywhere in its cost proposal was an adjustment made. Therefore, DOT believes that there is no question that this credit adjustment to Boeing's cost proposal was appropriate.

D. Relocation Costs

Dynalelectron asserts that DOT did not develop its own estimate for the comparison and evaluation of the offerors' relocation costs. Dynalelectron goes on to argue that without such an estimate the only logical basis for evaluating relocation cost was historical experience. Dynalelectron alleges, however, that DOT apparently disregarded the historical experience at the Transportation Test Center and instead based its adjustment of Boeing's proposed relocation costs on that company's average separation at NASA's Kennedy Space Center. Dynalelectron alleges that in its proposal it documented a Transportation Test Center history of relocations to arrive at an estimated 16 relocations per year. Dynalelectron believes that based on this historical experience 16 relocations per year was the minimum figure that DOT should have used. Dynalelectron, therefore, questions DOT's factual support for the conclusion that the Kennedy Space Center separation experience was the same as the Transportation Test Center experience. In Dynalelectron's opinion, DOT should have added an additional \$200,000 to Boeing's proposed relocation costs to make them approximate to Dynalelectron's.

DOT states that Dynalelectron's proposed relocation costs were \$305,460 and Boeing's adjusted relocation costs were \$413,445. DOT emphasizes, then, that the estimated total probable relocation costs were significantly greater for Boeing than for Dynalelectron. As to Boeing's separation experience at Kennedy Space Center, DOT recognizes that there was no factual way to guarantee that that experience could be directly transposed to the Transportation Test Center. DOT

points out, however, that there was also no way to guarantee that Dynalelectron's separation experience was a true representation of what it should have been or could have been for the Transportation Test Center under different management. In DOT's opinion, corporate management has a tremendous effect on retention of personnel. Consequently, in view of Dynalelectron's history of problems in turnover of personnel, DOT states that it did not rely on the company's experience in terms of separations.

E. Minimum Staffing for Salaried Personnel

In reviewing DOT's analysis of Boeing's relocation cost, Dynalelectron asserts that DOT clearly ignored the fact that Boeing did not offer the minimum salaried staffing required by amendment 3 to the RFP. According to Dynalelectron, amendment 3 required that offerors propose a minimum of 168 man-years of effort for each of the 4 basic contract years and 185 man-years for the option year. Dynalelectron alleges that Boeing, by DOT's own admission, proposed only 151 and 169 man-years, respectively. Calculating on the basis of a difference of \$5 per hour between salaried and non-salaried personnel, Dynalelectron takes the position that Boeing's cost proposal was therefore understated by approximately \$899,199.

DOT states that the RFP was not as restrictive as Dynalelectron asserts with regard to man-years of effort. DOT states that the RFP merely required that offerors propose on a target of productive man-hours falling within a minimum and maximum swing. Within this swing, DOT states that salaried staff was constrained only in what was defined as "Salaried Other" and each offeror was free to use its own judgment in terms of the number of "Salaried Managers" it proposed. In Boeing's case, DOT indicates that when its proposed total of 151 salaried personnel for the basic 4 years and 169 for the option year were added to the salaried personnel of Boeing's three minority and small business subcontractors, Boeing's proposal met the minimum manning requirement of the RFP.

Analysis

(keyed to the above-lettered paragraphs)

A. Evaluated costs rather than proposed costs provide a sounder basis for determining the most advantageous proposal in cost-reimbursement procurements since the Government is required within certain limits to pay the contractor's actual, allowable and allocable costs. 52 Comp. Gen. 870, 874 (1973). We have stated that the procurement agency's judgment as to the methods used in developing the Government's cost estimate and the conclusions reached in evaluating the proposed costs are entitled to great weight since the procurement agencies are in the best position to determine realism of costs and must bear the major criticism for cost overruns because of defective cost analyses. Dynatrend, Inc., B-192038, January 3, 1979, 79-1 CPD 4. Thus, we will not second-guess an agency's cost realism determination unless it is not supported by a reasonable basis. Grey Advertising, Inc., 55 Comp. Gen. 111 (1976), 76-1 CPD 325.

We believe that DOT's determination not to allow Dynalelectron to use a 59-hour vacation factor was reasonable. It appears from the record that the historical experience of Dynalelectron with regard to productive man-hours was only for a 1-year period. Moreover, the RFP's Area Wage Determination required offerors to recognize 2 weeks of vacation after 1 year of service. Even so, we note that DOT did recognize that this wage determination did not apply to salaried employees and, thus, DOT, in strict compliance with the RFP, did not assess to Dynalelectron's proposal the costs of increased vacation to such employees. Finally, we also note that the additional hours added to Dynalelectron's cost proposal were computed at the RFP's minimum productive man-hours instead of the higher figure used by Dynalelectron.

B. We believe that the essential point here centered around the appropriateness of Dynalelectron's treatment of sick leave for salaried employees. Apparently, Dynalelectron had not been using a specified sick leave policy for salaried employees and salaried sick leave had been included in Dynalelectron's level of effort at the Transportation Test Center. However, with the

exception of Dynalelectron, the other offerors had specified levels for sick leave for salaried personnel in their cost proposal. In fact, the record shows that the methodology used by Dynalelectron in estimating salaried time off was discussed during negotiations. During the discussions it appears that Dynalelectron requested that DOT consider the fact that often Dynalelectron's personnel worked overtime without compensation which Dynalelectron believed offset the inclusion of salaried sick leave in the level of effort. Because DOT considered unusual Dynalelectron's proposal to offset salaried paid time off with overtime, DOT concluded that the halving of Dynalelectron's 38 hours of paid time-off figure was not supportable and in conflict with normal accounting practices.

C. Dynalelectron has raised only a suspicion that Boeing received double credit for cafeteria credits. DOT specifically states that it checked and rechecked the possibility of Boeing having received double credit and determined that no double credit occurred. As to Dynalelectron's request that we independently investigate to ensure that double credit was not given to Boeing, it is not our practice to conduct investigations pursuant to our bid protest function for the purpose of establishing the validity of a protester's speculative statements. Mission Economic Development Association, B-182686, August 2, 1976, 76-2 CPD 105. In the absence of probative evidence, as is the case here, we must assume that a protester's allegations are speculative and conclude that the protester has not met its burden of proof. Dependable Janitorial Service and Supply, B-190231, January 3, 1978, 78-1 CPD 1.

D. We agree with DOT's position that relocation cost is intimately related to corporate management. The record shows that Dynalelectron had a history of turnover of personnel problems at the Transportation Test Center as evidenced, particularly by the 100-percent turnover in Dynalelectron's key personnel during the life of its contract there. Further, we believe that DOT's use of Boeing's separation history at Kennedy Space Center was reasonable. The record reveals that DOT chose Boeing's Kennedy Space Center experience as a baseline for projection of relocation costs because the Kennedy Space Center and the

Transportation Test Center were both remote locales. Even so, Boeing's retention of personnel situation was still more difficult than Dynalelectron's because the Kennedy Space Center workforce enjoyed many potential job opportunities in the surrounding military-commercial space business community and, thus, was quite mobile. Because of the limited job opportunities in the Pueblo, Colorado, area, it appears that the workforce at the Transportation Test Center was substantially captive.

E. Dynalelectron references substitute page D-8 of amendment 3 as support for its contention that that RFP amendment required offerors to propose a minimum of 168 man-years of effort for each of the 4 basic contract years and 185 man-years for the option year. However, we find nothing on that page or elsewhere in amendment 3 that specified such a minimum. Rather, amendment 3 to the RFP provided as follows:

"2. The offeror shall propose a target of productive manhours for the initial four years falling within a swing from 3,788,928 productive manhours to 4,642,560 productive manhours, which shall result in the contract minimum and maximum for the four years. The offeror shall also propose a target of productive manhours for the option year falling within a swing from 1,044,576 productive manhours to 1,276,704 productive manhours which shall result in the contract minimum and maximum for the option year. The Government estimated targets of man years fall approximately in the middle of these swings (reference schedules 4, 4A, 5 and 5A of this section). Proposals shall not deviate (+) more than 34 manyears from the Government estimate (as set forth in Schedule 5) for each year proposed. Proposals shall not deviate (+) more than 36 manyears from the Government estimate (as set forth in schedule 5A) for the option year proposed."

As DOT points out, when the salaried personnel of Boeing's minority and small business contractors were added to Boeing's own salaried personnel, Boeing's proposal satisfied the target guidelines of RFP amendment 3.

Conclusion

Accordingly, Dynalectron's protest is denied.

A handwritten signature in dark ink, appearing to read "Milton J. Aroslan". The signature is fluid and cursive, with a large initial "M" and a long, sweeping underline.

Acting Comptroller General
of the United States